

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1121

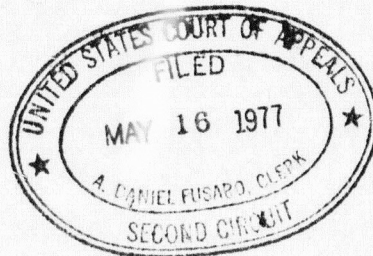
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

B
PJS

-----x
THE UNITED STATES OF AMERICA, :
 :
Plaintiff-Appellee, :
 :
-against- :
 :
FAON DE JESUS RODRIGUEZ, :
 :
Defendant-Appellant. :
-----x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
FAON DE JESUS RODRIGUEZ



Respectfully Submitted,

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Dated: May 11, 1977

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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Plaintiff-Appellee, :
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-against- :
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FAON DE JESUS RODRIGUEZ, :
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Defendant-Appellant. :
-----X

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DAVID WOLF, being duly sworn, deposes and says:

Deponent is not a party to the action, is over the
age of 18 years and resides at Union, New Jersey 07083.

On May 11, 1977, deponent served the within BRIEF OF
DEFENDANT-APPELLANT FAON DE JESUS RODRIGUEZ upon DAVID G. TRAGER,
UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, at
225 Cadman Plaza East, Brooklyn, New York, the address designated
by said attorney for the purpose by depositing two (2) copies of
same in a post-paid properly addressed wrapper, in--a post office-
official depository under the exclusive care and custody of the

United States Postal Service within the State of New York.

Sworn to before me this 11th day of May, 1977.

Notary Public, State of New York
No. 004395155
Qualified in Westchester County
Commission Expires March 30, 1978

David Wolf
DAVID WOLF

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CASES CITED.....	i
ISSUES PRESENTED.....	ii
STATEMENT OF THE CASE.....	iii
STATEMENT OF FACTS.....	1-7
ARGUMENT	
<u>POINT I</u> THE IMPOSITION OF A SPECIAL PAROLE TERM UNDER THE YOUTH COR- RECTION ACT IS ILLEGAL.....	8-9
<u>POINT II</u> FAILURE OF THE JURY TO FOLLOW THE INSTRUCTIONS OF THE COURT YIELDED AN INCONSISTENT FINDING AND REQUIRES REVERSAL.....	10-14
<u>POINT III</u> REFUSAL TO INSTRUCT THE JURY AS TO A LESSER INCLUDED OFFENSE WAS IM- PROPER UNDER RULE 31(C).....	15-16
CONCLUSION.....	17

TABLE OF CASES CITED

<u>CASE</u>	<u>PAGE</u>
<u>Dunn v. U.S.</u> , 284 U.S. 390.....	10
<u>Sansone v. U.S.</u> , 380 U.S. 343, 855 S. Ct. 1004, 13 L. Ed. 882.....	16
<u>Sealfon v. U.S.</u> , 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 180.....	10
<u>Steckler v. U.S.</u> , 7 F. 2d. 59(2 Circ. 1925).....	10
<u>U.S. v. Costello</u> , 221 F. 2d. 668 aff. 350 U.S. 359...	10
<u>U.S. v. Cala</u> , 521 F. 2d. 605.....	12
<u>U.S. v. Gugliaro</u> , 501 F. 2d. 68(2 Circ. 1975).....	11
<u>U.S. v. Handel</u> , 464 F. 2d. 679 (2 Circ. 1972).....	10
<u>U.S. v. King</u> , 373 F. 2d. 813 (2 Circ. 1967).....	10
<u>U.S. v. Marcone</u> , 275 F. 2d. 205.....	11
<u>U.S. v. Magnus</u> , 365 F. 2d. 1007(2 Circ. 1966).....	16
<u>U.S. v. Maybury</u> , 274 F. 2d. 899 (2 Circ. 1960).....	11
<u>U.S. v. Prueitt</u> , 540 F. 2d. 995 (9 Circ. 1976).....	10
<u>U.S. v. Seijo</u> , 537 F. 2d. 694 (2 Circ. 1976).....	16
<u>U.S. v. Zane</u> , 495 F. 2d. 683 (2 Circ. 1974).....	10

ISSUES PRESENTED

1. Whether the inconsistent verdict returned by the jury resulted from a misapplication of the Court's instructions?
2. Whether the Trial Court erred in denying a request to charge a lesser included offense?
3. Whether the imposition of a special parole term was illegal?

STATEMENT OF THE CASE

The instant indictment charged appellant with violations of Title 21, Sections 841(a)(1) and 846 and Title 18, Section 2, to wit; possession with intent to distribute (2 counts) distribution (2 counts) and conspiracy to unlawfully possess with intent to distribute (1 count).

A notice of motion to suppress statements and evidence seized was filed May 14, 1976. The suppression hearing commenced October 27, 1976 and concluded October 29, 1976. The motion to suppress tangible evidence seized was denied in all respects. The motion to suppress statements made by co-appellant BEVERLY inculcating appellant, RODRIGUEZ was granted pursuant to the Bruton rule.

The trial commenced December 20, 1976 and concluded December 22, 1976.

Appellant was convicted of conspiracy and acquitted of all four substantive counts.

Appellant was sentenced under the Youth Corrections Act, Title 18 U.S.C. Section 5010(b) and placed on special parole for a term of 3 years.

The Notice of Appeal was filed within the statutory period. Execution has been stayed pending appeal.

STATEMENT OF FACTS

Robert Goncieski, an unindicted co-conspirator testifying as a government witness, stated that on November 4, 1975, he sold 4 ounces of cocaine to a DEA agent (1.57-60).^{*} Allegedly, his suppliers were appellant, RODRIGUEZ and co-defendant, BEVERLY (1.50-57).

On November 4, 1975, appellants went to Goncieski's home, gave him the cocaine to be sold, and followed him to Kennedy Airport (the site of the sale) (1.57). Goncieski entered the Kennedy Terminal, met several other friends and contacts, and shortly thereafter sold cocaine purportedly worth \$4800.00 to Special Agent Kane of the DEA. Appellant's presence at the airport was purportedly to watch and verify the actual transaction. (1.57, et seq.)

There was a total lack of evidence corroborating, verifying or in any regard substantiating Goncieski's claim that appellant, RODRIGUEZ, acted with Goncieski regarding the November 4, 1975 narcotic transaction at Kennedy Airport (2.7-19).

Subsequent to the transaction, Agent Kane attempted to purchase larger quantities of cocaine from Goncieski, to

^{*}Refers to Trial Transcript.

no avail (1.62, 1.149-150). Finally, in February, 1976, Goncieski was arrested by the Drug Enforcement Administration (1.62). In return for his cooperation, the DEA promised to make his efforts known to the sentencing judge--Goncieski agreed (1.64).

Goncieski thereupon allegedly made arrangements with appellant, RODRIGUEZ and co-appellant, BEVERLY, to sell more cocaine (1.66). The plan was that co-appellant, BEVERLY, would deliver the cocaine to Goncieski at the intersection of Elton & Liberty Streets, Brooklyn, New York, and that appellant, RODRIGUEZ, accompanied by his mother and sister, would follow Goncieski to Aqueduct Raceway to watch and verify the actual sale (1.66-67).

On March 2, 1976, the day before the planned transaction, appellant, RODRIGUEZ, was observed by Agent Kane speaking to Goncieski, in the latter's car, at Elton & Liberty Streets (1.154). The following day, March 3, 1976, Agent Paulick, DEA, observed co-appellant, BEVERLY, exit his home and get into a van. He was carrying a small bag in his hand (2.90). Appellant exited 2 minutes later with 2 women and got into a different car. Rodriguez and Beverly waved to one another and Beverly drove off only to return a few

minutes later. He and appellant, RODRIGUEZ, spoke briefly and BEVERLY left again (2.91 et seq.). BEVERLY was "tailed" throughout by Agent Paulick in his government vehicle (2.93).

Agent Kane stated that he saw BEVERLY park in back of Goncieski's car. When Goncieski touched his brake lights, the prearranged signal, agents closed in and arrested BEVERLY. The small bag contained cocaine (1.159). In addition, BEVERLY was found to have on his person some more cocaine and several documents which contained purported drug codes (2.108-110). Special Agent Heather Campbell searched BEVERLY'S van and seized a paper containing purported prices for cocaine (2.146-147).

Agent Kane testified that he never saw appellant, RODRIGUEZ, at Kennedy Airport on November 4, 1975; that appellant did not, at any time, possess the small bag containing cocaine, contrary to his sworn affidavit; that RODRIGUEZ did not get into Goncieski's car, contrary to his sworn affidavit; and that he could not verify any of Goncieski's allegations regarding appellant's narcotics involvement (2.19-33). Appellant was arrested in front of his home, some 2 blocks from the transaction between BEVERLY &

GONCIESKI.

On cross-examination, Goncieski admitted using and selling marijuana, cocaine, heroin, LSD, amphetamines, barbituates (1.83-92). He admitted selling drugs from the time he was 16 (1.96). He also admitted that in return for his cooperation, the government had permitted him to plead guilty to use of a telephone facility for narcotic transaction to cover the indictment (1.77). In addition, he stated his feeling that if the appellants were convicted, his chances for probation would be improved (1.79).

Agent Paulick testified that co-appellant, BEVERLY, admitted that the pieces of paper seized from him contained drug codes and that he obtained the cocaine from his apartment. He stated that he was to deliver the cocaine to Goncieski, who would sell it, and in turn give part of the money to BEVERLY (2.116-117).

Co-appellant, BEVERLY, testified that he and Goncieski had a strong friendship (2.161), but that he had often admonished Goncieski about his drug use (2.165). He further said that Goncieski had attended his wedding uninvited and was abusive to his new wife. Appellant threw Goncieski out of the wedding reception (2.163).

BEVERLY denied entirely the November 4, 1975 transaction (2.166). However, several days before March 3, 1976, BEVERLY stated that Goncieski kept calling him asking for drugs (2.167).

On March 3, 1976, Goncieski called BEVERLY at 7:00 A.M. and asked that the latter come over to his house to repair his car. BEVERLY agreed and went to Goncieski's house accompanied by appellant, RODRIGUEZ (2.168). When they arrived, the car had been towed to the gas station (2.169). BEVERLY stated that he came over as a favor in the hope that Goncieski would help him get a job he was seeking (2.170). At Goncieski's house, BEVERLY was asked by Goncieski to hold the drugs and notations because Goncieski was afraid that his aunt (whose home he lived in) would discover the items and throw him out (2.171). The drugs and codes had previously been kept in Goncieski's car. However, because the car was towed away, he could not use the car for that purpose (2.171). It was arranged between Goncieski and BEVERLY that the drugs, etc. would be returned later that day on Elton & Liberty Streets.

BEVERLY stated that he left his home and went to meet Goncieski to return the drugs. He stated that he was

uncertain whether the meeting was set for Liberty & Elton Streets or Liberty & Essex Streets (also nearby). For that reason he returned to the vicinity of his home and verified the location, Liberty & Elton, with his brother-in-law, appellant, RODRIGUEZ (2.173-175).

When BEVERLY got into Goncieski's car to return the drugs, he was arrested at gunpoint (2.178-179). On the way to headquarters, BEVERLY told Agent Paulick that he had gotten the drugs and codes, etc. from Goncieski (2.180). Agent Paulick discounted the admission and BEVERLY, in response to Paulick's insistence, stated that RODRIGUEZ was his supplier. On the stand, BEVERLY admitted the statement, but said it was untrue and was said solely because he was frightened and wanted to stay out of jail (2.180-182).

A character witness, ROBERT JONES, testified on BEVERLY'S behalf (3.3). He stated that for the five (5) months prior to December, 1976, that he knew BEVERLY, the latter was reliable, honest and a hard worker (3.5).

Appellant, RODRIGUEZ rested.

Goncieski was not recalled by the Government.

Appellant was convicted of conspiracy, but acquitted on all the remaining counts.

Co-Appellant, BEVERLY, was convicted of conspiracy and possession with intent to distribute and distribution of cocaine on March 3, 1976. He was acquitted of the November 4, 1975 transaction.

POINT II

THE IMPOSITION OF A SPECIAL
PAROLE TERM UNDER THE YOUTH
CORRECTION ACT IS ILLEGAL.

Appellant was sentenced under the Youth Correction Act, pursuant to Title 18 U.S.C. 5010(b) in lieu of incarceration under other available statutory possibilities. In addition thereto, the Court imposed a special parole term of three (3) years. Such additional parole term is impermissible.

Section 5010(b) of Title 18 provides:

"(a) The Court may suspend sentence and place the defendant on probation. 18 U.S. C. 5010(a)

(b) The Court may sentence the defendant to the custody of the Attorney General for treatment and supervision, in lieu of imprisonment under other statutory provisions, with release required within six years of conviction. 5010(b)

(c) If the Court finds that the defendant will not benefit from treatment and supervision, it may sentence the defendant for a term of imprisonment which may exceed

six years but may not exceed
the maximum period authorized
by statute for the crime. 18
U.S.C. 5010(c)

(d) If the Court finds that the
defendant will derive no benefit
from the Federal Youth Corrections
Act sentencing, it may sentence
the defendant under any other
applicable provision. 18 U.S.C.
5010(d)

Accordingly, the maximum sentence may not exceed
six (6) years. It stands to reason therefore that the
addition of the special parole term contravenes the statute
and is illegal.

POINT II

FAILURE OF THE JURY TO FOLLOW
THE INSTRUCTIONS OF THE COURT
YIELDED AN INCONSISTENT FINDING
AND REQUIRES REVERSAL.

Once again, the often scaled, indeed assaulted, peaks of Sealfon v. U.S., 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 180 must bear yet another attempt to successfully harness its rationale. In the instant case, appellant, RODRIGUEZ, was convicted of conspiracy to possess with intent to distribute and distribution of cocaine. He was acquitted of all substantive counts.

We do not contend that the inconsistency of the verdict is a ground warranting reversal. In fact, if anything is clear, it is that consistency in the verdict is unnecessary. Steckler v. U.S. 7 F. 2d. 59; Dunn v. U.S., 284 U.S. 390; U.S. v. Handel, 464 F. 2d. 679 cert. den. 409 U.S. 984; U.S. v. Costello, 22, F. 2d. 668 aff. 350 U.S. 359; U.S. v. Zane, 495 F. 2d 683; U.S. v. Prueitt, 540 F. 2d. 995. Nor are we unmindful that the holding in Sealfon, supra, which vitiated an inconsistent verdict in separate trials, is inapplicable to inconsistent verdicts rendered in a multicount indictment. U.S. v. King, 373 F. 2d. 813;

U.S. v. Marcone, 275 F. 2d. 205; U.S. v. Maybury, 274 F. 2d.

899. Rather, we contend that an inconsistent verdict must be set aside where it occurs as the result of misapplying or ignoring the instructions of law charged by the Trial Court.

While it is unnecessary to delve at length into the reasons supporting the inviolable sanctity of jury deliberation, suffice it to say that the rule recognizes that a "compromise or an indication of leniency may underlie apparently inconsistent verdicts". U.S. v. Zane, 495 F. 2d. 683, 690. Another, and equally compelling reason, is that "...it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict". U.S. v. Gugliaro, 501 F. 2d. 68, 70. However, in a case where the charge of the Court clearly apprises the jury what it must determine and the pre-requisite for that determination, no conjecture need intrude upon a careful scrutiny of the meaning of a verdict.

In Sealfon, supra, the Court stated:

"Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict in the first trial" (emphasis added) at Page 578-579.

* * * * *

"The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict" at Page 580.

As can be seen from the language of Sealfon, supra, the charge of the Court was one of the foundation stones necessary for ~~scouting~~ of the meaning of the jury's verdict. See U.S. v. Cala, 521 F. 2d 605. In the instant case, the Court charged:

"In short, in count one of the indictment the defendants are charged with conspiracy to commit the offenses which are charged in counts two, three, four and five of the indictment." (3.112)

The clarity of this language must have been far better received by the lay jury than the impressions of the mystical incantations often found in conspiracy instructions. The charge clearly implied that the substantive offenses had to be committed before the jury could return a verdict of guilty on the conspiracy count. Under the facts peculiar to this case, there was no possible way for the appellant to have conspired with co-appellant BEVERLY without being guilty of the substantive counts as an aider and abettor. The testimony of both Goncieski and Beverly as to the actions of appellant lead to the ineluctable conclusion that he was either an active participant in the possession with intent to distribute cocaine and its actual distribution or he was innocent of the charges.

The finding by the jury that appellant did not aid and/or abet or assume the role of active participant in the criminal scheme underscores the jury's failure to heed the instruction of the Court. Here, rather than reaching a verdict reflecting leniency, the jury, unable to conclude that appellant was guilty of the substantive counts, concluded

that he must have been guilty of something--and only the conspiracy count remained.

Bearing in mind that the Court charged the jury on the substantive counts before the conspiracy count, it is not unreasonable to assume that the jury saved the conspiracy count for its final deliberations. Indeed, the jury asked for and received a re-reading of the conspiracy charge. Within an hour thereafter, it returned its verdict of guilty.

We contend that in order for the jury to have arrived at its verdict it must necessarily have declined to follow the charge of the Court. Accordingly, its inconsistent verdict is not only inconsistent with the facts, but also with the Court's instructions and should be vacated.

POINT III

REFUSAL TO INSTRUCT THE JURY
AS TO A LESSER INCLUDED
OFFENSE WAS IMPROPER UNDER
RULE 31(C).

Pursuant to Fed. Rules Cr. Proc., Rule 31(c) Title 18 U.S.C., counsel submitted a request that the Court charge the lesser included offense of simple possession of cocaine as to the co-appellant BEVERLY. In conjunction therewith, a request for an entrapment charge was also made. The Court refused to submit the lesser included offense or the affirmative defense to the jury. (3.7 et seq.)

We contend that the failure of the Court to charge as requested was plain error requiring reversal. We further contend that the failure to charge the lesser included offense as to co-appellant BEVERLY indirectly adversely affected appellant, to wit: that had the jury convicted co-appellant BEVERLY of simple possession it would have been constrained to acquit appellant RODRIGUEZ of conspiracy to possess with intent to distribute and distribution of the narcotic.

The facts presented during the trial, particularly

co-appellant BEVERLY'S testimony, clearly elicited a sufficient factual basis to support a lesser included offense charge. In substance, the co-appellant testified that Goncieski had asked him to hold the cocaine and the slips of paper containing drug codes and prices for a temporary period. BEVERLY was arrested, he testified, when he attempted to return those items to Goncieski. Under these facts, it was mandatory for the Court to charge the lesser included offense as well as the affirmative defense of entrapment.

In Sansone v. U.S., 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d. 882, the Supreme Court held that a lesser included offense instruction is proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense. See also U.S. v. Magnus, 365 F. 2d. 1007; U.S. v. Seijo, 537 F. 2d. 694.

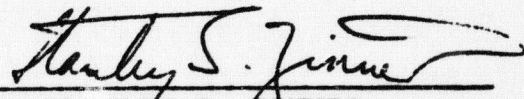
There was no justifiable reason for refusal to charge as requested. The violation of Rule 3(c) requires reversal and remand for a new trial.

CONCLUSION

By reason of the foregoing, the judgment of conviction should be reversed or in the alternative the sentence imposed should be modified by vacating the special parole term.

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